STATE OF MICHIGAN

COURT OF APPEALS

DELORIS FAY TURNER, Plaintiff-Appellee,	UNPUBLISHED January 27, 2009
v	No. 276584 Wayne Circuit Court
HUBERT WILLIAM TURNER, Defendant-Appellant.	LC No. 06-613993-DO

Before: Hoekstra, P.J., and Fitzgerald and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right a judgment of divorce, challenging the trial court's property division. We reverse and remand for further proceedings.

I. Standard of Review

The principles governing a trial court's division of marital assets are summarized as follows:

> The goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of property in light of all the circumstances. The trial court need not divide the marital estate into mathematically equal portions, but any significant departure from congruence must be clearly explained. Trial courts may consider the following factors in dividing the marital estate: (1) the duration of the marriage, (2) the contributions of the parties to the marital estate, (3) the age of the parties, (4) the health of the parties, (5) the life situation of the parties, (6) the necessities and circumstances of the parties, (7) the parties' earning abilities, (8) the parties' past relations and conduct, and (9) general principles of equity. When dividing marital property, a trial court may also consider additional factors that are relevant to a particular case. The trial court must consider all relevant factors but not assign disproportionate weight to any one circumstance. [*Berger v Berger*, 277 Mich App 700, 716-717; 747 NW2d 336 (2008) (citations and internal quotations omitted).]

This Court reviews the trial court's findings of fact for clear error and accords them substantial deference. *Id*., p 717. If the findings are upheld, this Court examines whether the dispositional ruling was fair and equitable in light of those facts. *Id.* "This Court will affirm the

lower court's discretionary ruling unless it is left with the firm conviction that the division was inequitable." *Id*., pp 717-718.

II. Property Division

Defendant argues that the trial court erred in awarding a disproportionate share of the marital assets and property to plaintiff on the basis of plaintiff's unsubstantiated allegation that defendant was concealing assets.

The principal asset of the parties' 29-year marriage was the marital home, which was appraised at $110,000 and had been fully paid. The trial court awarded the home to plaintiff. To justify its unequal distribution of marital property, the trial court focused on defendant's inability to account for money that had been in an annuity account established through defendant's employer and for proceeds from the sale of a second home.

Defendant retired in January 2000 from the Detroit Water and Sewerage Department where he worked for 32 years, ten of which were before he and plaintiff were married. He had both a city pension and an employment plan in which the city matched employee contributions in an annuity that was invested in stocks. Defendant testified that the annuity had a value close to $200,000 in 2000, and at another point had a value of $215,000. At the time of trial, there was no money left in the annuity. Defendant testified that he made periodic withdrawals from his annuity and spent the money. When the trial court inquired what he spent $200,000 on, defendant replied, "It wasn't $200,000," and noted that the value of the annuity fluctuated. He was unsure how many withdrawals he had made over the years and testified that he incurred a 30-percent penalty for the withdrawals he made because they were made before he was 62 years old. Defendant also acknowledged selling a home for $50,000 to his child or children.

The trial court found that money from defendant's annuity and the sale of the second home was "basically . . . unaccounted for." In determining the amount of unaccountable funds, the court began its calculation with the $215,000 value that defendant had referenced and reduced that amount by 30 percent to reflect the penalty for early withdrawal, bringing the value to approximately $150,000. The court then added the $50,000 proceeds of the sale of the second home, but subtracted $5,000 to reflect the approximate cost of trips made by the parties. ($150,000 + $50,000 - $5,000 = $195,000.) The court then estimated expenditures of $1,000 a month for 48 months to reflect spending on a "nice lifestyle" and further subtracted $12,000 that was used to pay off the marital home. ($195,000 – $48,000 – $12,000 = $135,000.) Next, the court subtracted $45,000, representing the cost for remodeling the marital home, $10,000 for a 1995 Chevrolet van, and $20,000 for a GMC Envoy, leaving $60,000 as the amount of the unaccountable funds. ($135,000 - $45,000 - $10,000 - $20,000 = $60,000.)[1] The court then awarded the entire value of the marital home to plaintiff, because defendant could not account for the missing funds, reasoning:

[1] The trial court incorrectly identified the amount as $61,000.

> What I know is that the fair market value of this house is $110,000 half of that would be close to $61,000 maybe something less, something more. The Court is satisfied that basically this money is unaccounted for. The Court's going to award the house to [the] Plaintiff free and clear of the Defendant.

On appeal, defendant argues that the trial court erred in awarding plaintiff a disproportionate share of the marital estate on the basis of plaintiff's unsubstantiated allegation that he had concealed assets. We agree.

It is apparent that the trial court's conclusion that there was a substantial amount of money that was "unaccounted for" was based on flawed calculations. First, the starting point for the court's calculations was based on a faulty premise. Although defendant testified that the annuity account at some point in time had a value of $215,000, the undisputed testimony also indicated that the value fluctuated over time because the annuity was invested in stocks and that money was withdrawn on multiple occasions. The parties did not present evidence establishing the fluctuating values of the account or the actual amounts that were withdrawn.

In addition, although the trial court stated that it had "deducted everything you gave me and I'm still missing $61,000," the court did not include several expenditures that were referenced in the testimony. Defendant testified that he purchased a 2000 GMC van for $42,000, which he returned as a "lemon" and recouped $13,000. The court did not include the $29,000 difference in its calculations. Plaintiff and defendant also agreed that defendant bought an Envoy.[2] Plaintiff testified that they sold another car for $12,000, deposited that money, and then paid $20,000 down at the time the Envoy was purchased. She testified that defendant paid the balance on the Envoy after he retired. The trial court referenced the down payment, but did not include the payment of the balance of the purchase price, which was not specified. Defendant also testified that he purchased his uncle's portion of a house that was "left" to him for $10,000. The trial court did not refer to this payment. Defendant and plaintiff testified that defendant purchased a new motorcycle, which was included in the judgment of divorce. Defendant testified that he paid $5,000 as the down payment for this purchase. The trial court did not refer to this payment. Defendant also testified that he paid $5,000 toward plaintiff's credit card. The court did not refer to this payment. Defendant additionally testified that he paid $6,000 annually for car insurance, which the trial court did not mention.

By the trial court's calculations, $61,000 was unaccounted for after deducting all of the expenditures mentioned by defendant, but the court's calculations did not include additional expenditures mentioned by defendant of approximately $49,000 ($29,000 + $10,000 + $5,000 + $5,000 = $49,000), plus car insurance for an unspecified number of years and the unspecified balance for the Envoy.

Because the evidence did not show the net amounts withdrawn from the annuity account and because the court purported to consider "everything [defendant] gave me," but actually

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[2] The judgment refers to a 2002 GMC Envoy.

failed to consider substantial expenditures that he claimed to have paid, the court clearly erred in determining that $61,000 was "unaccounted for."

Furthermore, the court's finding that $61,000 was "unaccounted for" did not justify a departure from a congruent division of the marital estate. Defendant's inability to fully account for expenditures from an annuity account over a period of years before the divorce was not a valid basis for treating the monies as an asset awarded to defendant, particularly in the absence of any finding that defendant attempted to conceal money that continued to exist as a marital asset, which the evidence would not have supported. Cf. *Thames v Thames*, 191 Mich App 299, 301-302, 309; 477 NW2d 496 (1991) (the trial court's finding that the defendant attempted to deprive the plaintiff of marital assets by placing marital money in a trust for the benefit of a third party supported the trial court's property division). The court also did not make a finding that defendant dissipated marital assets without the fault of plaintiff. See also 2 Michigan Family Law (2008 supp), Property Division, § 15.21 (when a party has dissipated marital assets without the fault of the other spouse, the value of the dissipated assets may be included in the marital estate). The trial court only found that defendant was unable to account for money that had been in an annuity and for proceeds from the sale of a house. Dissipation and concealment are factors that a court may consider in dividing property. But defendant's inability to account for an undetermined amount of money that was spent over a period of years did not alone justify a departure from congruence in the division of the marital estate. Moreover, the trial court improperly focused exclusively on defendant's inability to account for the money. Even when there is evidence of a deliberate attempt to conceal assets, that attempt "is only one of many facts that the court must weigh." *Sands v Sands*, 442 Mich 30, 36; 497 NW2d 493 (1993). Here, the court assigned defendant's inability to account for money "disproportionate weight" by not considering any other circumstance. *Berger, supra*, p 717.

The proper method for handling the division of marital property where the potential for undisclosed assets is a concern is the inclusion of a provision in the judgment that undisclosed assets are not covered by the judgment and are subject to further post-trial motions. *Wiand v Wiand*, 205 Mich App 360, 368; 522 NW2d 132 (1994). Although the judgment in the present case included a provision for undisclosed assets, it improperly stated that they were to be automatically forfeited. See *Sands, supra*, p 37 ("An attempt to conceal assets does not give rise to an automatic forfeiture."); *Koy v Koy*, 274 Mich App 653, 659; 735 NW2d 665 (2007);

For these reasons, we reverse the trial court's property distribution and remand for reconsideration of the property division in light of this opinion.

III. Pension and Spousal Support

Defendant also argues that the trial court erred in its distribution of his pension to plaintiff.

Analysis of the pension award is complicated by the disparity between the trial court's ruling from the bench and the judgment of divorce. The court stated from the bench that it was awarding plaintiff 50 percent of the marital portion of the pension, "not the prior ten years." Consistent with that ruling, the judgment of divorce specifies that plaintiff "is irrevocably awarded a fifty (50%) percent interest in the marital share of the Defendant's pension plan . . . by way of a Qualified Domestic Relations Order." There is no indication in the record that the trial

court entered a QDRO. Instead, the judgment of divorce includes an award of spousal support of $2,500 a month until plaintiff's death, which is inconsistent with the trial court's ruling at the conclusion of the trial that defendant would be required to pay plaintiff's COBRA payments in lieu of spousal support. It appears that the unexplained award of spousal support in the divorce judgment was intended as an alternative to awarding plaintiff half of the marital portion of the pension.

Defendant does not challenge the inclusion of provisions in the judgment ordering both spousal support and half of the marital portion of the pension. Rather, he seems to contest the amount of support as erroneous because it is "half" or "more than one-half" of his pension, and plaintiff was supposed to receive only half of the *marital* portion of the pension.

The record is bereft of the necessary factual findings for this Court to determine whether the monthly spousal support of $2,500 exceeds one half of the marital portion of the pension benefit. There is no indication how the trial court calculated the pre-marital portion of the benefit. See, e.g., *Vander Veen v Vander Veen*, 229 Mich App 108, 111-113; 580 NW2d 924 (1998) (providing one method a court may use to distribute a pension when the period in which the pension was earned includes time when the parties were not married).

On remand, the trial court shall explain the basis of the award of spousal support and the distribution of the pension benefit. The court may revisit the award in conjunction with the property distribution. See *Magee v Magee*, 218 Mich App 158, 165-166; 553 NW2d 363 (1996).

IV. Attorney Fees

Defendant argues that the trial court abused its discretion by ordering him to pay $1,500 of plaintiff's attorney fees, given that plaintiff was awarded more than half of the marital assets and was not in need of assistance. In light of our decision regarding the property and spousal support issues, we are unable to determine whether an award of attorney fees is appropriate. The trial court shall consider this matter anew on remand. *Hanaway v Hanaway*, 208 Mich App 278, 299; 527 NW2d 792 (1995).

Reversed and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Brian K. Zahra